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No. 99-161

IN THE

SUPREME COURT OF THE UNITED STATES

CHAD WEISGRAM, *et al.*,

Petitioners,

v.

MARLEY COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federal court of appeals ought to enter judgment as a matter of law for a defendant when it determines that the district court abused its discretion as gatekeeper and admitted legally insufficient expert opinion evidence, the balance of plaintiff's evidence is insufficient, plaintiff failed to ask for new trial in the district court and in the court of appeals, and the record in the court of appeals presents no reason, compelling or otherwise, to warrant a new trial?

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 corporations representing a broad cross section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products.[2]

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court.

In this case, the Eighth Circuit determined that Petitioner's expert opinion evidence failed to satisfy the requirements of Rule 702 of the Federal Rules of Evidence as explained by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)[3] and that, therefore, there was not a legally sufficient evidentiary basis for the District Court to have submitted the case to

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[1] The parties have consented to the filing of this Brief *Amicus Curiae*. Letters constituting their consent have been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this Brief in whole or in part and that no person other than *Amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this Brief.

[2] PLAC is a non-profit membership corporation formed in June 1983, pursuant to Act 162, State of Michigan Public Act of 1982. PLAC members are listed in the Appendix.

[3] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) had not been decided when the Court of Appeals decided this case. The Court of Appeals determined that the expert evidence at issue should have been excluded under Rule 702 of the Federal Rules of Evidence as unreliable whether or not the *Daubert* approach was employed. *Weisgram v. Marley*, 169 F.3d 514, 518 n.3 (8th Cir. 1999).

the jury. Finding that the Petitioners ". . . had a fair opportunity to prove their claim and they failed to do so," the Court of Appeals entered judgment in favor of the Respondents; the Court of Appeals was not asked to grant a new trial, or to remand for that determination, and it found no reason from its own examination of the Record to exercise its discretion to grant a new trial. *Weisgram*, 169 F.3d at 517 n.2. PLAC member corporations frequently are sued for wrongful death, personal injury or property damage, where the reliability of expert opinion evidence advanced against its members is challenged. Its members have an interest in consistent and proper enforcement of Rule 50 of the Federal Rules of Civil Procedure, which requires that only legally sufficient evidence be considered. Further, its members have fairness interests in finality, and in the conservation of private and public resources. PLAC members have an interest in advocating that, except in the most extraordinary circumstances, proponents of product liability cases are given one full and fair opportunity to present their claims, but no more. PLAC can offer a useful perspective on policy concerns that warrant entry of judgment in insufficiency of evidence cases. Accordingly, *Amicus* has a strong interest in assisting this Court in determining the type of evidence considered by a court in ruling on a motion for judgment as a matter of law, and the appropriate procedural disposition of cases where expert opinion evidence, albeit admitted, is unrealiable and, therefore, not legally sufficient to support the verdict.

SUMMARY OF ARGUMENT

Courts of appeals, when reviewing rulings on motions for judgment as a matter of law, are to consider only legally sufficient evidence – erroneously admitted evidence is not legally sufficient by definition, and is not to be considered. Thus, if, as here, a court of appeals determines

that the district court abused its discretion in performing its gatekeeping function required by Rules 104 and 702 of the Federal Rules of Evidence and *Daubert* by admitting unreliable expert opinion evidence, that evidence does not provide a legally sufficient evidentiary basis to sustain a claim. This practice is mandated by the Federal Rules of Civil Procedure, as explained by the Advisory Committee Notes and the weight of federal case law. A contrary potpourri of cases was spawned in the state court system unaccompanied by any reasoned analysis and should not be followed.

Confronted with an insufficiency determination, judgment as a matter of law ordinarily should be granted. The statutory grant of authority in 28 U.S.C. §2106 certainly provides the jurisdiction, and *Neely v. Martin K. Eby Const. Co., Inc.*, 386 U.S. 317 (1967) makes clear that Seventh Amendment rights are not violated by this practice. A court of appeals ordinarily should exercise its discretion to order judgment, rather than a new trial or remand for that determination. Only when a new trial motion is made in strict compliance with Rules 50(c)(2) and/or Rule 50(d), coupled with some showing of excusable neglect and the existence of evidence that would have remedied the deficiency, should the new trial motion be considered. A rule presumptively entitling the verdict winner to a new trial is not fair to the adversary, would result in an extravagant waste of private and public resources, and would encourage mischief – for example, the practice of holding back with some evidence to use as an argument for a new trial. The entry of judgment is warranted especially when, as here, the verdict winner never asks for a new trial, the Court of Appeals *sua sponte* addresses the new trial question, and finds no evidence to remedy the deficiency.

Entry of judgment by the Court of Appeals does not violate the Seventh Amendment in any respect. Courts of appeals are required, if asked, to review *Daubert* gatekeeping decisions for abuse of discretion. In determining whether the evidence is relevant and reliable, courts of appeals do not re-examine facts. Further, the verdict winner is afforded three opportunities to ask for a new trial, and *Neely* teaches that the Seventh Amendment is not violated by the fact that a court of appeals has the discretion to make the new trial determination on its own.

ARGUMENT

I.

COURTS RULING ON RULE 50 MOTIONS FOR JUDGMENT AS A MATTER OF LAW, OR COURTS REVIEWING SUCH RULINGS ON APPEAL, MUST CONSIDER ONLY LEGALLY SUFFICIENT EVIDENCE.

Petitioner and its *Amicus* press the contention in the first instance that the screening standard for the type of evidence considered by a court in ruling on, or reviewing a ruling on, a Rule 50 motion for judgment as a matter of law, is all *admitted* evidence, whether or not *legally sufficient*. This position is contrary to the express wording of the Rule, is inconsistent with its history and the case law on which the standard is based, and is not good policy.

A. Rule 50 Requires Consideration Only of Legally Sufficient Evidence; The Rule's History Reinforces This Notion. Rule 50 specifically states that a court, in ruling on a Rule 50 motion for judgment as a matter of law, whether before or after the close of evidence or a verdict, must determine whether there is a "legally sufficient evidentiary basis" for a reasonable jury to find for a party on that issue.[4] The Rule is not premised on a consideration of all *admitted* evidence, but only *legally sufficient* evidence; the Rule clearly contemplates a situation where evidence was admitted, yet determined not to be "legally sufficient."[5]

[4] As the courts of appeals review such determinations *de novo*, they apply the same standard. *See, e.g., Finley v. River N. Records, Inc.*, 148 F.3d 913, 917 (8th Cir. 1998).

This Court promulgated the Federal Rules of Civil Procedure on December 20, 1937. The Rules, drafted and revised by an appointed Advisory Committee on Civil Rules, are accompanied by *Advisory Committee Notes* prepared by this Advisory Committee. Though these Notes are not controlling or binding, they are formidable authority for construing the Rules. These Notes are today the principal source of revision history for construing and interpreting the Federal Rules of Civil Procedure. This Court has deemed them a "respected source of scholarly commentary." *Tome v. United States*, 515 U.S. 150, 159 (1995). This Court has instructed that the Notes are properly afforded "weight." *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444 (1946). *See also, Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988).

Nowhere in the revision history of this Rule is it ever suggested that a determination under this Rule should be based on all *admitted* evidence, whether *legally sufficient* on the issue or not. Prior to 1991, when Rule 50 was revised substantially, the Rule did not expressly articulate the standard for granting a motion for judgment as a matter of law (or motions for a directed verdict and/or for judgment notwithstanding the verdict, as they were known prior to the 1991 revision). *Fed. R. Civ. Proc. 50 Advisory Committee Notes (1991)*. The standard up until that point had been expressed in long-standing case law. *See*

[5] It is of no consequence that the Eighth Circuit in this case determined that the evidence was *inadmissible*. Clearly, it determined that the evidence was *legally insufficient* under standards established by this Court in *Daubert*. It was an unnecessary next step to then say the evidence was thus *inadmissible*.

generally, Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn.L.Rev. 903 (1971), cited in *Advisory Committee Notes* (1991) and cases therein. The revision in 1991 to expressly articulate the standard effected no change in the existing standard. *Id.* The Revisors state. "[t]he expressed standard makes clear that action taken under this Rule is a performance of the court's duty to assure enforcement of the controlling law. . . ." *Fed. R. Civ. Proc. 50 Advisory Committee Notes (1991).* The standard also is used as a standard for the entry of judgment under Rule 56(a), and therefore serves as a link for these two provisions. *Id.* Specifically addressing the application of this standard in a post-verdict motion pursuant to Rule 50(b), the *Notes* state "[i]n ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." *Id.* There is no basis to argue from the express language of the Rule or the Notes that a court must consider all *admitted* evidence in ruling on a motion for judgment as a matter of law. The contrary is true – the express wording of the standard in Rule 50(a), and its history, support the notion that only *legally sufficient* evidence is to be considered.

B. Federal Case Law Supports the Contention That Only Legally Sufficient Evidence is of Value. The proper practice, that is, to consider all legally sufficient evidence, is followed in a number of Circuits, although in some cases the particular court characterizes the legally insuffient evidence as evidence that should not have been admitted, or suggests that it is excising evidence or ruling on a truncated record; this characterization is of no consequence. For example, in *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997), the Fifth Circuit affirmed the grant of a motion for judgment as a matter of law where the trial court determined that Plaintiff's

expert's evidence was unreliable, and excluded it. Thereafter, the Court granted the Defendant's motion for judgment as a matter of law because, absent this testimony, there was insufficient evidence to take the case to the jury. *But see, Dixon v. International Harvester Co.*, 754 F.3d 573, 580 (5th Cir. 1985). The Eighth Circuit obviously followed this approach in this case, and in *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) and *Peitzmeier v. Hennessey Indus., Inc.*, 97 F.3d 293, 296 (8th Cir. 1996). *But see, Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 360 (8th Cir. 1973). The Sixth Circuit also recently followed this approach in *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 306 (6th Cir. 1997). *But see, Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-1344 (6th Cir. 1992). The United States Court of Appeals for the District of Columbia Circuit has followed this approach. *Scott v. District of Columbia,* 101 F.3d 749, 758 (D.C. Cir. 1997); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 825 n.9 (D.C. Cir. 1988). *Cf., Raynor v. Merrell Pharmaceuticals Inc.*, 104 F.3d 1371, 1372 (D.C. Cir. 1997) (noting that even though this is what in fact the District Court did in *Richardson*, the issue was not briefed or discussed).

The Third Circuit has been the most vocal on this issue, suggesting in *dicta* in *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 115 (3rd Cir.), *cert. denied,* 484 U.S. 853 (1987) that it would follow this approach, which it indeed did seven years later in *Lippay v. Christos,* 996 F.2d 1490, 1501 (3rd Cir. 1993) and *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1199 (3rd Cir. 1993).

The Third Circuit, in *Lightning Lube,* pointed out that its *dicta* in *Aloe Coal* foreshadowed its holding in *Lippay. Lightning Lube,* 4 F.3d at 1199. The Third Circuit acknowledged this Court's *dicta* in *Montgomery Ward and Co. v. Duncan,* 311 U.S. 243, 249 (1940) to the

effect that assertions that the district court erred in admitting or excluding evidence should not be considered in a motion for judgment, but further stated that, to its knowledge, ". . . the Supreme Court never has addressed directly the issue of whether a trial court, in reviewing the sufficiency of the evidence with respect to a motion for judgment, must take the record as presented to the jury and thus cannot enter judgment on a record altered by the elimination of inadmissible evidence." *Lightning Lube*, 4 F.3d at 1199. The Court noted:

> There is a difference between determining whether evidence should be excluded on a motion for judgment as a matter of law and deciding whether a record contains sufficient evidence to sustain a verdict. For example, a litigant moving for judgment as a matter of law may argue as a reason for granting its motion that certain evidence was admitted erroneously because it was prejudicial. It is possible that even excluding such evidence, the jury had a sufficient reason to find against the movant, but the admission of the additional evidence so inflamed it as to affect its deliberations. This might be the case, for example, with bad character evidence introduced pursuant to Fed. R. Evid. 608. In such a case, it clearly would be inappropriate for the district court to rely on this evidentiary error in granting the motion for judgment because the issue of harmful error is distinct from the issue of the sufficiency of the evidence. A different situation is presented, however, where the movant predicates his motion for judgment on a claim that without the inadmissible evidence, there is insufficient evidence to sustain the verdict. We find the court's *dicta* in *Montgomery Ward* is unclear as to whether, in determining a motion for judgment, excluding inadmissible evidence that falls into this latter category is inappropriate.

Lightning Lube, 4 F.3d at 1199 n.26. In *Lightning Lube*, the Court held that it was not to consider improperly admitted evidence of a lawyer's statements in reviewing the sufficiency of evidence sustaining a punitive award asserted in a counter-claim. *Id.* Given this determination, and the insufficiency of the remaining evidence of malice in connection with the punitive damages claim in the counter-claim, the Court concluded that the evidence could not support an award of punitive damages. *Id.*

These cases are but examples from the federal case law of courts without reservation granting judgment to parties when the evidence – even when admitted – is legally insufficient.

C. Contrary Decisions Represent "Precedential Inbreeding," Lack Reasoned Analysis, and Therefore are Unpersuasive. PLAC recognizes that there is contrary precedent. Indeed, as is evident from the preceding discussion, there is contrary precedent in some of the very jurisdictions that follow the traditional practice. The Eighth Circuit's decision in *Midcontinent* represents the first reported instance in which a *federal* appellate court held that it was error for a trial court, in ruling on a motion for judgment notwithstanding the verdict, to do so on a diminished record. It relied in its decision on *dicta* from this Court's decision in *Montgomery Ward*, and on the Supreme Court of New Mexico's decision in *Townsend v. United States Rubber Co.*, 74 N.M. 206, 392 P.2d 404, 406-407 (1964).[6] Both instances of reliance are unper-

[6]The Court in *Midcontinent* also made a passing reference to imputed reliance on the part of the Plaintiff, and suggested that, had the Plaintiff been forewarned during the trial that such evidence was inadmissible, ". . . it conceivably could have supplied further foundation or even totally different evidence." *Id.*, 471 F.2d at 359. However, other than this conclusory statement, no analysis is provided.

suasive, for different reasons, and support PLAC's contention that this is not the better reasoned practice.

In *Montgomery Ward*, this Court discussed the interplay between a motion for judgment notwithstanding the verdict and a motion for a new trial, and held that a court's grant of the motion for judgment does not effect an automatic denial of the alternative motion for a new trial, and, upon a reversal, the defendant is entitled to have the case remanded to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. *Id.*, 311 U.S. at 249. This Court did *not* address the question presented here. The Eighth Circuit apparently relied upon a general discussion by this Court on the interplay between grounds typically advanced in support of a motion for judgment notwithstanding the verdict, and grounds advanced for a new trial, some of which overlap. *Midcontinent*, 471 F.2d at 358. In discussing the grounds advanced in that particular case, the Court stated that the motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment, and gave as an example in *dicta* "that the court erred in rulings on evidence. . . ." *Montgomery Ward*, 311 U.S. at 247. This Court did not hold or suggest that it is inappropriate for a trial court to consider only legally sufficient evidence in ruling on a motion for judgment notwithstanding the verdict, and *Midcontinent*'s reliance on this *dicta*, therefore, is not persuasive.

The Eighth Circuit's reliance in *Midcontinent* on *Townsend* also is not persuasive, but for different reasons. Indeed, the Supreme Court of New Mexico did hold that it is inappropriate to rule on a motion for judgment notwithstanding the verdict on a diminished record after the elimination of evidence submitted to and considered by

the jury. *Id.*, 392 P.2d at 406. The Court took the position that, whether competent or incompetent, *all* evidence submitted to the jury must be considered by a court in ruling on a motion for judgment notwithstanding the verdict, and stated that the proper remedy is a new trial. *Id.* However, rather than presenting a reasoned analysis for these conclusory statements, what follows as support for this assertion is simply a string citation to eleven aged state court decisions. *Id.* at 406 and cases cited therein. PLAC has reviewed each of these decisions and, while it is true that each case holds that the improper admission of evidence in that particular case resulted in the need for a new trial, none of the evidence admitted was expert witness testimony on the part of the Plaintiff's case that was necessary to make out a *prima facie* case. The search for the font of reason for the *Midcontinent* holding thus ends in a dry well. Thus, a "precedent without precedent" was established. A state appellate court holding sprang into existence without any reasoned analysis, and was subsequently parroted by a number of other state appellate courts. Thereafter, it leapt into the federal system in *Midcontinent*, and infected some subsequent decisions. *See, e.g., Schudel v. General Electric Co.*, 120 F.3d 991, 994 (9th Cir. 1996); *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695-696 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir. 1992); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983).

At a point in the historical development of this aberrant line of cases, the Third Circuit skeptically observed:

> We have carefully examined the opinions from the Fifth and Eighth Circuit, and New Mexico, but re-

> grettably we find no reasoned elaboration to support their thesis that "in ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." . . . The longest discussion appears in New Mexico's Townsend case which, upon analysis, is one conclusory statement piled on another . . . . What results is a classic case of precedential inbreeding where decisions multiply and parrot a holding with no court pausing, first, to identify the competing social, public, or private interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution.

Aloe Coal, 816 F.2d at 115 (citations omitted).[7]

This brief historical survey explains the origin of those decisions cited by Petitioner and his *Amicus* in support of the assertion that all admitted evidence, even if legally insufficient, must be considered in ruling on a motion for judgment as a matter of law. These decisions sprang from self-proclaimed precedent, without precedent, emanating from dated state court decisions, and should not be followed. Rule 50 makes clear, in its express articulation of the standard, based on federal case law, that only legally sufficient evidence can be considered.

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[7]The Supreme Court of Utah in *Franklin v. Kenton Ray Stevenson*, 1999 Utah LEXIS 95 (1999), adopted a unique approach, rejecting the notion that a JNOV motion could be addressed on an abridged record, but also rejecting the notion that the remedy for the improper admission of evidence is always a new trial. Absent proof of new admissible expert testimony warranting a new trial, the judgment should be reversed. *Id.* at 1.

II.
ABSENT PROOF OF EXCUSABLE NEGLECT, THE ABSENCE OF A LEGALLY SUFFICIENT EVIDENTIARY BASIS TO DEFEAT A RULE 50(b) MOTION SHOULD RESULT IN JUDGMENT RATHER THAN A NEW TRIAL.

Petitioner and its *Amicus* urge the adoption of a rule that *all* cases decided on an insufficiency of the evidence basis warrant a new trial, or, at a minimum, where the insufficiency determination is made by the appellate court, remand to the trial court for a new trial determination. Urging that rule on his facts, Petitioner contends that the Court of Appeals failed to consider whether the Petitioner "might be able" (Pet. Br. at 3) to present additional evidence not offered at the first trial, explicitly stating that there were experts he did not call and implying that there was other evidence not put in evidence that would have made out a *prima facie* case circumstantially. Further, he contends that he could have obtained new experts. Petitioner and his *Amicus* argue that such a rule is necessary because otherwise they will be forced to overtry their cases by calling duplicative expert witnesses, and because they otherwise are not afforded an opportunity to ask for a new trial.

A. Rule 50(d) Permits a Court of Appeals to Enter Judgment as a Matter of Law, to Grant or Deny a New Trial Request, or to Remand to the District Court for That Determination. Pursuant to Rule 50(d), a court of appeals can, in addition to entering judgment, grant or deny a new trial request; this is not the exclusive purview of the trial court pursuant to Rule 50(a), as Petitioner argues. (Pet. Br. at 17). The statutory authority is granted pursuant to 28 U.S.C. §2106, and the Seventh Amendment is not violated by the fact that the courts of appeals can enter judgment, grant a new trial, or remand to the trial court for that determination. *Neely v. Martin K.*

Eby Const. Co., Inc., 386 U.S. 317, 321 (1967). When the motion for judgment as a matter of law is denied in the trial court, and there is an appeal, *Neely* teaches that jurisdiction over the case passes to the court of appeals. *Id.* at 324. At this point, consideration of the new trial question is squarely and exclusively lodged with the court of appeals, as Rule 50(c)(2) no longer applies. *Id.*

Rule 50(d) itself belies Petitioner's assertion that what the Court of Appeals did deprives him of an opportunity to be heard on the new trial question. (Pet. Br. at 19). There were two such opportunities after the case left the trial court – in his Brief as Appellee, and on Petition for Rehearing, neither of which he invoked. As stated in *Neely:*

> In our view, therefore, Rule 50(d) makes express and adequate provisions for the opportunity – which the [party who has verdict set aside on appeal] had without this Rule – to present his grounds for a new trial in the event his verdict is set aside by the Court of Appeals.

Id. at 329. There is no absolute right to have a new trial motion heard by the trial court, as *Neely* makes clear.

Even in those instances where the exercise of a trial court's discretion might be involved in a new trial determination, it is the role of the court of appeals to consider the new trial question "in the first instance." *Id.* at 324. The court's approach admittedly should be "discriminating." *Id.* at 326. There certainly is no reason for the court of appeals not to address the issue when questions of subject matter jurisdiction or dispositive issues of law are raised. *Id.* at 326. Even in instances of insufficiency of evidence rulings where, for example, the new trial request is based on the erroneous exclusion of evidence by the trial court, or where the court itself caused

the insufficiency by imposing too high a burden of proof on the proponent, these still present issues of law ". . . with which the courts of appeals regularly and characteristically must deal." *Id.* at 327. The district court ". . . has no special advantage or competence in dealing with them." *Id.* "Final action on these issues normally rests with the Court of Appeals." *Id.* at 328. The Court stated that, while recognizing that the same issues placed before a trial court will call for the exercise of the court's discretion, ". . . there is no substantial reason why the [party having his verdict set aside on appeal] should not present the matter to the court of appeals, which can if necessary remand the case to permit an initial consideration by the District Court." *Id.* at 328.[8]

Thus, 28 U.S.C. §2106, coupled with Rule 50(d) and this Court's *Neely* decision, make it clear beyond dis-

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[8]Petitioner cites a wholly distinguishable case of this Court, *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967) in support of his contention that the trial could should make the new trial determination. Indeed, this Court did determine in *Iacurci* that the facts there were such that under *Neely*, the Court of Appeals should have remanded to the trial judge for determination. *Id.* at 88. However, in *Iacurci*, the jury had failed to answer numerous questions on a special verdict form, despite explicit directions to do so. *Id.* As this Court noted, this chould have been for a number of reasons. *Id.* at 87-88. Perhaps, indeed, the jury did intend to resolve those questions in Defendant's favor, but the jury might also have been unable to agree on these issues, or it simply might not have passed upon them because it already had determined negligence on another ground. *Id.* at 87. This Court determined that the case should have been remanded to the trial judge, who was in the best position to pass upon this question, given the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. *Id.* at 88. The question in *Iacurci*, unlike the question in *Neely* and the question in this case, is not the type of question "regularly and characteristically" dealt with by courts of appeals. *Neely*, 386 U.S. at 327. What is important is that *Iacurci* was decided within the *Neely* framework and is indeed completely consistent with it.

pute that, in addition to ruling on a new trial request, or remanding for that determination, a court of appeals can enter judgment as a matter of law.

B. Cases Decided on an Insufficiency of the Evidence Basis Warrant Judgment, Not a New Trial, Absent Proof of Excusable Neglect. For reasons of fairness and conservation of private and public resources, parties who have had a full and fair opportunity to present their case, later deemed insufficient pursuant to Rule 50(b), should not be awarded a new trial; judgment ordinarily should be entered against them, absent a request for a new trial made in strict compliance with Rule 50, and absent actual proof of some type of excusable neglect that resulted in evidence not being offered in the first trial. Even in such a case, certain showings of sufficiency should be required – a new trial should not be automatic, even in these cases. It must remembered that Rule 50 was adopted for the purpose of speeding litigation and avoiding unnecessary retrials. *Montgomery Ward*, 311 U.S. at 250.

Fairness concerns predominate. In the typical case, both parties, not just the party seeking the new trial, presumably have been involved in litigation for a period of months and years in complex cases, at varying levels of expense – dramatically greater expense in sophisticated and complex product liability litigation. Discovery has been conducted, as well as motions practice and trial, all of which take a toll both financial and emotional, but with some solace at the thought of finality, at least in the trial court level. These parties have, presumably, played by and within the Rules – what fairness is there in forcing the party who obtains judgment on a Rule 50 basis and who has played by the Rules and won to try the case again? A rule permitting automatic retrials on a reliance basis – imputed or actual – could result in repetitive re-

trials as well. Certainly, this does not advance the goals of the timely, efficient and final disposition of litigation.

Weight should be given to the resources expended – public and private. Absent proof of some type of excusable neglect and the availability of evidence that would have remedied the deficiency, a new trial is a wasteful exercise for all concerned. Courts and counsel are too busy to waste resources on repeat litigation absent a compelling reason to the contrary.

A "reliance" rule, whether that reliance is imputed or actual, does not strike a fair balance between the fairness needs of the parties, as well as concerns for judicial efficiency and conservation of economic resources. An imputed reliance rule should be rejected outright. No showing is required. There is no way to evaluate the claim of reliance, and it would result in a presumptive retrial in every instance. Further, any rule based on actual reliance – which at first blush may hold some appeal – would encourage mischief. The rule should not create an incentive to withhold voluntarily the presentation of evidence so that the litigant could then later argue for a new trial for the reason that, in reliance on the court's rulings, it withheld evidence – for "strategy reasons." Alternatively, such a rule could create an incentive to try certain types of cases in the first instance solely to ferret out defense strategy – this is a "win-win" proposition for plaintiffs. Either they win on the first try and the verdict is affirmed, or they go back to trial with their withheld expert, but this time with the benefit of a dissection of defense strategy. The instant situation, where a trial has occurred, is a much more compelling situation devoid of any basis for reopening discovery to obtain new experts. A rule that would require proof of excusable neglect, coupled with the presentation of evidence that would have reme-

died the situation, should be required before a new trial is granted.[9]

Plaintiffs' fairness concerns are more than adequately addressed by such a practice. Counsel ought to be aware of the evidence required under the controlling substantive law to make a *prima facie* case – particularly the types of expert opinion evidence that will be required. Rule 16 scheduling orders provide clarity and certainty as to the time available to locate, develop and identify expert witnesses, and also provide ample time for preparation of Rule 26(b) information.[10] The district court has the discretion to extend dates in the scheduling order for good cause shown. Competent counsel in complex litigation certainly know or should know the requirements imposed by Rule 702 of the Federal Rules of Evidence and *Daubert* that the testimony be relevant and reliable. Counsel certainly know or should know that expert opinion testimony in all likelihood will be challenged – they are on notice that their experts need to be qualified, and express opinions that are relevant and reliable. In short, counsel are or should be on notice that they better come to court with experts who are qualified and who have reliable opinions. They are further on notice that the trial court's gatekeeping discretion is wide,

[9] Any suggestion that a new trial should be granted so that discovery can be re-opened and new experts obtained, as Petitioner suggests, destroys the balance attempted in the fairness equation. There simply is no justification for it. No such practice exists when Rule 56 motions are granted. Defendants successful in *Daubert* issues at the pretrial stage frequently couple these motions with summary judgment motions contingent on the outcome of the expert issues. Those who have summary judgment entered against them in this scenario are not afforded an opportunity to re-open discovery and retain new experts.

[10] Also, in many instances, plaintiffs are able to locate and develop expert witnesses at their leisure even before suit is filed. Defendants have no such luxury.

and will be reversed only for abuse of discretion. In short, it is not a revelation that a court, trial or appellate, may find expert witnesses unqualified: litigants who proffer unqualified experts, or experts who express unreliable opinions, do so at their peril. With ample time to develop expert evidence, and well-marked substantive and procedural roadmaps, fairness does not require a second chance, except in the most extraordinary of circumstances.

C. A New Trial is Not Warranted in This Case. The Eighth Circuit ruled on the new trial question here, as it was required to do under *Neely, even though* Petitioner did not, as Appellee and pursuant to Rule 50(d), ask for a new trial, either in his Brief or in his Petition for Rehearing (or ask for a new trial conditionally in the trial court pursuant to Rule 50(c)(2)). The Eighth Circuit ruled that a new trial was not warranted. In such a case, where Appellee presents no new trial issue in his Brief or in a Petition for Rehearing, the court may in any event order a new trial on its own motion or refer the question to the trial court. *Neely*, 386 U.S. at 329. There was no other evidence – the Court of Appeals so determined. The Court of Appeals' decision not to grant a new trial, reviewable only for an abuse of discretion, is sound.[11]

The Court of Appeals did not have before it, and therefore did not address, any contention that a new trial was warranted because there were withheld experts, for the simple reason that Petitioner failed in his obligation – clear since the enactment of Rule 50(d) in 1963 and certainly since this Court's decision in *Neely* – to bring these grounds to the attention of the Court of Appeals. As this

[11] Petitioners make clear, as they must, given this Court's Order, that they are not asking this Court to review the Record to reach its own conclusion as to sufficiency of the evidence. (Pet. Br. at 19).

Court makes clear, both in its decisions and its Rules, its normal policy is not to review such questions. *Neely*, 386 U.S. at 330. There is no reason to deviate from that policy here.

III.
THE EIGHTH CIRCUIT DECISION IN *WEISGRAM* DOES NOT INVOLVE A DENIAL OF A RIGHT TO JURY TRIAL OR A RE-EXAMINATION OF FACTS IN VIOLATION OF THE SEVENTH AMENDMENT.

Petitioner and his *Amicus* appear to advance three somewhat interwoven arguments premised on an asserted violation of the Seventh Amendment. They appear to argue that (1) the Seventh Amendment was violated by the Court of Appeals when it reviewed the trial court's exercise of its gatekeeping function because, in their view, it re-examined the facts; (2) the Seventh Amendment was violated because Petitioner was denied an opportunity to ask for a new trial; and (3) alternatively, the Seventh Amendment was violated when the Court of Appeals ruled on the new trial question, rather than allowing the trial court to do it. In each case, PLAC contends that the issue is not presented for review, but that, in any event, the Seventh Amendment is not compromised by anything that occurred here.

A. The Findings of Insufficient Reliability. It is the normal policy of this Court not to consider issues which have not been presented to the courts of appeals, and which are not properly presented for review in this Court. *See Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967). Such is the case here.

Petitioner's argument that the Seventh Amendment was violated by the Eighth Circuit in its review of the reliability of the expert opinion evidence pursuant to *Daubert*, is simply an effort to "back-door" substantive

review of the Eighth Circuit's decision that this evidence should not have been admitted; review of this issue was sought in this Court, and the Court issued its *writ* only on Question 2. This argument essentially is that the Court of Appeals erred in excluding the testimony, and the argument is that the Court erred in part for constitutional reasons and in part for *Daubert* reasons, even though the argument is clothed exclusively as a Seventh Amendment argument. For example, one of the challenges asserted by Petitioner's *Amicus* is that the Court of Appeals failed to compare the methods used by the experts here with those used in the relevant scientific community. (Am. Brief at 13). The issue of whether the Court of Appeals erred in holding that the expert evidence was inadmissible is simply not before this Court, and it makes no difference whether the arguments advanced to support that contention are premised on the Seventh Amendment, or are premised on *Daubert*.

On the merits, no "factual re-examination" occurred. The Eighth Circuit's decision was not premised on an evaluation of the weight of the evidence, or on credibility determinations, but ratther on the reliability of the evidence according to a recognized legal, not factual, standard. That determination in turn warranted a finding that there was not a legally sufficient evidentiary basis for sending this case to the jury.

At issue in *Weisgram* was the reliability of expert opinion testimony admitted in Petitioner's case. The Eighth Circuit determined this testimony was not reliable, both for reasons of inadequate qualification, and, in two instances, because the opinion testimony was not founded on a reasonable factual basis. *Weisgram*, 169 F.3d at 519, 520, 521.

Petitioner's and his *Amicus'* attempts to categorize these determinations as a weighing of the evidence or as a finding of fact are belied clearly by the decision itself:

(1) The Court stated that the motion for judgment as a matter of law presents a legal question both to the District Court and to it on review: whether there is sufficient evidence to support a jury verdict (*Id.* at 517);

(2) The Court recognized that the District Court's charge under Rule 702, as refined in *Daubert*, is to make sure admitted testimony is both relevant and reliable (*Id.*);

(3) The Court recognizes the admittedly broad discretion of the trial court to admit expert opinion testimony (*Id.*); and

(4) The Court found portions of the testimony of each three to be unreliable, in the case of Freeman and Dolence in part because they were not qualified to offer opinions that the heater malfunctioned, and in the case of Freeman, Dolence, and Dolese, for the additional reason that there was no factual basis for their reconstruction of events, or to support their testimony. *Id.*, 169 F.3d at 519, 520, 521.

The Circuit Court's determinations that this expert evidence was unreliable, and that there was insufficient evidence to sustain the jury verdict, were determinatons of questions of law. *Daubert* made clear that district courts must screen expert opinion evidence to ensure that admitted expert evidence is relevant and reliable. Circuit courts certainly have the authority to review trial courts' decisions to admit or exclude expert testimony under *Daubert* and *General Elec. Co. v. Joiner*, 522 U.S.

136 (1997). The Court made clear in *Joiner* that the question of admissibility of expert testimony is not an issue of fact. *Joiner*, 522 U.S. at 142.

If a district court can determine to admit or exclude expert evidence, then certainly the courts of appeals, consistent with the Seventh Amendment, can determine whether the district court abused its discretion. It is settled that review of a determination by a district court under an abuse of discretion standard presents a question of law. *Joiner*, 522 U.S. at 142. Whether defined as "a definite and firm conviction that the trial court committed a clear error of judgment," *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989); or "an 'absolute absence of evidence to support the jury's verdict' " *Seidman v. American Airlines, Inc.*, 933 F.2d 1134, 1140 (5th Cir. 1991); or "(1) the court's decision is "clearly unreasonably, arbitrary or fanciful'; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the district court rationally could have based its decision," *Heat and Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986), the standards for reviewing for abuse of discretion clearly present an issue of law, not fact. Here, the Eighth Circuit's determinations that the trial court abused its discretion in admitting the evidence, and without it, the verdict therefore was not supported by legally sufficient evidence, were determinations of questions of law. Such a ruling plainly is consonant with the Seventh Amendment.

Petitioner's *Amicus* cites *Hetzel v. Prince William County*, 523 U.S. 208 (1998) in support of its position. However, in that case, in distinguishing *Neely*, this Court in effect distinguished the *Weisgram* case when it said that:

> . . . that case dealt with the application Fed. Rule Civ. Proc. 50(d) in a situation where the Court of Appeals had held that the evidence was insufficient to support a finding of liability. It did not involve overturning an award of damages where the evidence was found sufficient to support a finding of liability.

Id. at 209.

B. Ability to Have New Trial Motion Heard. The second aspect of the Seventh Amendment issue, that is, that this Amendment somehow is implicated in the Court of Appeals' Footnote No. 1 rejecting the notion that a new trial is warranted, also is not before the Court. This is for the simple reason that, despite procedural mechanisms in place affording Petitioner an opportunity at several different levels to ask for a new trial, Petitioner never did. Rule 50(c)(2) of the Federal Rules of Civil Procedure provided Petitioner with an opportunity to ask for a conditional new trial in the trial court level. Further, Rule 50(d) afforded Petitioner an opportunity to ask for a new trial in the Court of Appeals. This was not done. These same reasons also answer the claim on the merits.

It simply is not the case that Petitioner never had an opportunity to ask for a new trial. There were three opportunities, none of which were invoked.

C. Decision by Court of Appeals Not to Grant a New Trial. Petitioner, confronted with an express indication that the Court of Appeals *sua sponte* considered the new trial question, argues in the alternative that there is a constitutional requirement that the new trial question be addressed by the trial court, rather than the Court of Appeals. Petitioner suggests, with passing references to *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), *Iacurci*, and *Neely*, that the Seventh Amendment is implicated when a court of appeals makes a

new trial determination pursuant to Rule 59(a), rather than sending the case back to the trial court. This argument is never developed, other than to boldly state that such a ruling deprives Petitioner of his right to jury trial.

This issue is resolved by Rule 50(d) of the Federal Rules of Civil Procedure, as construed by the Court in *Neely*. In *Neely*, a diversity death action premised on common law principles, a Plaintiff's verdict resulted. Post-verdict JNOV and new trial motions were denied, and an appeal was noted. On appeal, appellee, verdict winner below, urged *only* for the verdict to be upheld; no new trial motion was made. The Court of Appeals determined that the evidence in the trial court was insufficient on issues of negligence and causation, and reversed, with instructions to dismiss the Complaint. The issue in the Supreme Court was whether the Court of Appeals could direct the trial court to dismiss the Complaint, in the face of the Seventh Amendment and in the face of Rule 50(c)(2), which gives a party whose jury verdict is set aside by a trial court ten days in which to invoke the trial court's discretion to order a new trial.

This Court held that the Court of Appeals could, consistent with both the Federal Rules of Civil Procedure and the Seventh Amendment, so order. *Id.*, 386 U.S. at 322. The Court first determined that there is no constitutional bar (Seventh Amendment) to an appellate court granting a motion for judgment notwithstanding the verdict. *Id.* The Court noted that it is settled that Rule 50(b) does not violate the Seventh Amendment's grant to right of a jury trial, and that there is no greater restriction on the province of the jury when an appellate court grants a JNOV motion than when the trial court grants it. *Id.*

Turning from the Constitution to the Federal Rules of Civil Procedure, the Court held that, once the case is in the Court of Appeals, Rule 50(d)—not Rule 50(c)(2)—controls. *Id.* at 323. Rule 50(d) mandates that consideration of the new trial question is at that point lodged with the courts of appeals. *Id.* Rule 50(c)(2) regulates new trial procedure only if the trial court grants the JNOV motion, which did not happen on these facts. *Id.*

In the face of a contention that courts of appeals are not equipped to rule on certain new trial issues, the Court recognized as a concern, and as concern of Rule 50(d), the protection of the rights of the party whose verdict has been set aside and who may have valid grounds for a new trial. *Id.* at 325. Many of these questions, noted the Court, present questions of law, which courts of appeals "regularly and characteristically" must address. *Id.* at 327. But, noted the Court, even with questions that could call for the exercise of a trial court's discretion, there is no "substantial reason" why the courts of appeals should not in the first instance consider the question, as those courts can, if necessary, remand to permit initial consideration by the trial court. *Id.* at 328.

The Court noted that a party in the verdict winner's position has three opportunities to ask for a new trial, the first in the district court, and then in the courts of appeals as appellee or, if filed, in a petition for rehearing. *Id.* at 329. A court of appeals can also *sua sponte* order a new trial. *Id.* Indeed, noted the Court, it is incumbent upon the courts of appeals to visit the issue, even if not raised by the parties. *Id.*

Tellingly, however, the Court in *Neely* did not rule on the new trial question. Petitioner had not suggested new trial grounds in the Court of Appeals, nor did she petition for rehearing in the Court of Appeals. Further, this

Court would not assume that the Court of Appeals ignored its duty to address the question, though noting that it would have been better had its Opinion expressly dealt with the new trial question. *Id.* Accordingly, given its normal policy of not considering issues which have not been presented to the courts of appeals, the new trial question was not addressed. *Id.*

Petitioner hints at but never develops an argument that assigning responsibility to the courts of appeals to grant or deny new trial requests, rather than remanding, is incompatible with this Court's decision in *Gasperini.* (Pet. Br. at 17). The *Gasperini* holding does not support the proposition for which it is advanced. The issue in *Gasperini* was the Seventh Amendment's bearing on the allocation of authority as between trial courts and appellate courts to review verdicts. *Gasperini,* 311 U.S. at 432. There, confronted with the issue of whether the federal court system could, consistent with the Seventh Amendment, accommodate a state statute requiring an appellate court to apply a "deviates materially" standard for excessive jury verdicts, the Court held that the federal trial judge should apply the standard, with federal appellate control limited to review for abuse of discretion. *Id.* at 433-438. Recognizing the large authority of a trial court to grant a new trial, and the "relatively late and less secure" development of appellate review of a federal trial court's denial of a motion to set aside a jury's verdict, the Court determined that this allocation of responsibility comported well with the Seventh Amendment, as nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside a jury verdict as excessive. *Id.* at 435.

The issue in *Weisgram,* as presented by Petitioner, is far different—the issue is whether the Seventh Amend-

ment re-examination clause is violated when a court of appeals itself addresses the new trial request in the first instance, where the purported basis for the request is that the appellee ought to be afforded a new trial to reopen discovery and identify additional witnesses. *Weisgram*, 169 F.3d 514, 517 n.2. The Seventh Amendment prevents "re-examination" of "facts tried by a jury." Consideration by the courts of appeal of whether a new trial should be awarded for the presentation of new evidence is not a "re-examination" of "facts tried by a jury," but rather, just the opposite. Further, such questions are within a class of issues described in *Neely*—typically questions that the district court has no special advantage or competence in dealing with. *Neely*, 386 U.S. at 328.

Nothing done by the Court of Appeals compromised the Seventh Amendment. Review by a court of appeals of a district court's gatekeeping function on an abuse of discretion standard does not involve a re-examination of facts. Petitioner was afforded three opportunities to address the new trial question—none of which she took. As the Court of Appeals said, "[t]his is not a close case." *Weisgram*, 169 F.3d at 517.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

1999 CORPORATE MEMBERS

3M
Allegiance Healthcare Corporation
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Atlantic Richfield Company
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Becton-Dickinson & Company
Bic Corporation
BIOMET
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Inc., Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton
Brown and Williamson Tobacco Company
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
Clark Material Handling Company
Coleman Company, Inc., The
Continental General Tire, Inc.
Coors Brewing Company
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Digital Equipment Corporation
Dow Chemical Company, The
E. & G. Gallo Winery
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estēe Lauder Companies

Exxon Corporation, U.S.A.
FMC Corporation
Ford Motor Company
Fortune Brands, Inc.
Freightliner Corporation
Gates Corporation, The; Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Co.
Global Industrial Technologies, Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Heil Company, The
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods, Inc.
Loewen Group International, Inc.
Lucas Varity
Lucent Technologies Inc.
Mack Trucks, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Melroe Company
Mercedez-Benz of N. America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Motor Coach Industries International, Inc.
Navistar International Transportation Corp.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The

Raytheon Aircraft Company
Rheem Manufacturing
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
SCM Group USA, Inc.
Sears, Roebuck and Company
Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
Smithkline Beecham Corporation
Snap-On Incorporated
Sofamor Danek Group, Inc.
Solutia Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Taylor Wharton Gas Equipment, A Division of Harsco
Tenneco Automotive
Terex Corporation
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.